MALAYAN UNITED INDUSTRIES BHD A

v.

KETUA PENGARAH HASIL DALAM NEGERI & ANOR B

HIGH COURT MALAYA, KUALA LUMPUR
RAUS SHARIF J
[APPLICATION REVISED COURT NO: R1-25-91-2002]
27 JULY 2005 C

REVENUE LAW: *Income tax - Assessment - Director General of Inland Revenue issued requisition in Form S under s. 108 Income Tax Act 1967 for years of assessment 1987-1993 - Whether a s. 108 requisition an assessment or a debt – Whether debt requisitioned under s. 108(5) could be considered "tax" - Income Tax Act 1967, ss. 33, 108(1), (5)* D

ADMINISTRATIVE LAW: *Remedies - Certiorari, application for - To quash decision of Director General of Inland Revenue issuing requisition in Form S under s. 108 Income Tax Act 1967 for years of assessment 1987-1993 - Whether an appeal to a s. 8 requisition lay by way of judicial review - Rules of the High Court 1980, O. 53* E

LIMITATION: *Revenue - Income tax assessment - Director General of Inland Revenue issued requisition in Form S under s. 108 Income Tax Act 1967 for years of assessment 1987-1993 - Whether time-barred - Limitation Act 1953, s. 6(1)(d)* F

This was an application by the applicant for judicial review under O. 53 of the Rules of the High Court 1980 ('RHC') of certain decisions of the first respondent, the Director General of Inland Revenue ("DGIR"). The second respondent was the Government of Malaysia. The applicant filed its income tax returns for the years of assessment 1987 to 1989, through its agent Taxation Services Sdn Bhd ("TSSB"), pursuant to the Income Tax Act 1967 ("ITA"). In June 1990, the DGIR requested further information including computation of the applicant's credit position under s. 108 of the ITA for years of assessment 1985 to 1989 from TSSB. This information was duly supplied by TSSB. In August 1990, the applicant filed Form C with the tax computation for 1990 and 1991 up to 1998 together with computation of the current position of the applicant's s. 108 account for those years, as requested by DGIR. Some 11 years later, DGIR issued a G H I

A requisition in Form S under s. 108 of the ITA for years of assessment 1987 to 1993. The issues were: (i) whether a s. 108 requisition under the ITA was an assessment or a debt; (ii) whether a debt requisitioned under s. 108(5) of the ITA could be considered "tax"; (iii) whether an appeal to a s. 108 requisition B lay by way of judicial review; and (iv) whether the Form S issued pursuant to s. 108 of the ITA some eight to eleven years later by the DGIR for the years of assessment 1987 to 1993 was time-barred by virtue of s. 6(1)(d) of the Limitation Act 1953 ("LA").

C **Held (allowing the applicant's application with costs):**

[1] Sums claimed under s. 108(1) of the ITA requisition are a form of statutory debt. Such sums clearly do not constitute "tax". Further, it is clear that s. 108(5) debts do not constitute duty within the meaning of the proviso to s. 33(1) D of the ITA as duty, in this sense, refers to federal taxes. (para 14)

[2] Judicial review is the most appropriate, convenient and suitable procedure to challenge a decision under s. 108 of the ITA. E (para 12)

[3] The second respondent's case against the applicant commenced upon the submission of all relevant forms by the applicant. Since a s. 108 requisition under the ITA was not F "tax" within the meaning of s. 33 of the ITA, the Form S issued by the DGIR some eight to eleven years later was time-barred pursuant to s. 6(1)(d) of the LA. (paras 16 & 17)

Case(s) referred to:

G *Ketua Pengarah Jabatan Hasil Dalam Negeri v. Rheem (Far East) Pte Ltd [1998] 2 CLJ Supp 351* ***(foll)***

Legislation referred to:

Income Tax Act 1967, ss. 103, 106, 108(1), (5)(a)
Limitation Act 1953, ss. 6(1)(d), 33(1)
H Rules of the High Court 1980, O. 53

For the applicant - Anand Raj (Irene Yong with him); M/s Shearn Delamore & Co
For the respondents - Norzilah Abdul Hamid (Norazira Abdul Wahab with her)

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JUDGMENT

Raus Sharif J:

[1] This is an application by the applicant for judicial review under O. 53 of the Rules of the High Court 1980 for the following reliefs:

(i) an order of *certiorari* to quash the decision of the first respondent, the Director General of Inland Revenue, contained in a Notification of Civil Proceedings (Form C.P. 91 – Pin. 1/01) issued to the applicant under s. 106 of the Income Tax Act 1967, demanding the payment of RM27,223,378.43 in sum due and payable to the second respondent, the Government of Malaysia;

(ii) an order of *certiorari* to quash the decision of the Director General of Inland Revenue, contained in Notification of Income Tax (in Form CP.17 – Pin 15/96) all dated 5th July 2002 demanding the payment of income tax, increased under s. 103 of the Income Tax Act 1967, in regard to the years of assessment 1987, 1988, 1989, 1990, 1991, 1992 and 1993; and

(iii) a declaration that the second respondent is not entitled to the sums due and payable in Forms CP.17, Forms CP.91 and certain requisitions purportedly issued under s. 108 of the Income Tax Act 1967 on 12 September 2001, (Forms S) in regard to years of assessment 1987, 1988, 1989, 1990, 1991, 1992 and 1993 by operation of s. 6(1)(d) of the Limitation Act 1953 or alternatively s. 91(1) of the Income Tax Act 1967.

[2] The facts of this case are these. The applicant filed its income tax returns for the years of assessment of 1987 to 1989 through its tax agent, Taxation Services Sdn. Bhd. (TSSB), within the time limited and in accordance with the requirements, under the Income Tax Act 1967 (ITA). On 8 June 1990, the Director General of Inland Revenue (DGIR) requested TSSB to provide certain information including computation of the applicant's credit position under s. 108 of the ITA for years of assessment of 1985 to 1989 ("the applicant's s. 108 account). TSSB replied to the DGIR's letter on 20 September 1990 and duly furnished the requisite information and particularly set out the applicant's s. 108 account for year of assessment of 1985 to 1990.

[3] Prior to responding to DGIR's letter of 8 June 1990, the applicant on 28 August 1990 had filed Form C with the tax computation for year of assessment for 1990 thereafter continued to duly file Form C and relevant enclosures for years of assessment 1991 to 1998. Computation of the current position of the applicant's s. 108 account for years of assessment 1990 to 1998 were also enclosed, in view of the DGIR's written request dated 8 June 1990.

[4] Thereafter, there was a period of silence lasting more than 11 years on the part of DGIR. Only on 3 October 2001, TSSB all at once received from DGIR requisition issued under s. 108 of the ITA for years of assessment of 1987 to 1993 in the prescribed Form S, all dated on 12 September 2001.

[5] Following the issuance of Form S, the applicant, through TSSB on 8 October 2001 wrote to the DGIR disputing liability to pay the requisition under Form S for year of assessment for 1987 to 1993 on the basis that the requisitions under Form S were time-barred for having been issued more than six years after the expiration of years of assessment of 1987 to 1993.

[6] Thus, the principle issue in this case is whether or not the Form S issued by the DGIR, which were all dated on 12 September 2001 for year of assessments for 1987 to 1993 under s. 108 of the ITA is time-barred.

[7] Section 108 of the ITA is a mechanism for the implementation of the imputation system in Malaysia. Under the imputation system, the income tax paid by a company on its profits is fully passed on or imputed to the shareholders when a dividend is paid. The workings of s. 108 of the ITA have been well illustrated in the case of *Ketua Pengarah Jabatan Hasil Dalam Negeri v. Rheem (Far East) Pte. Ltd.* [1998] 2 CLJ Supp 351 (*Rheem*'s case) where Azmel Maamor J (as he then was) at p. 359 stated as follows:

> In Malaysia the company taxation is based on the imputation system which means that the full amount of income tax paid by a company is imputed to the shareholders. Under s. 108 every company resident in Malaysia or a company resident in Singapore and which has declared itself to be a resident in Malaysia for the purpose of Article VII on dividends of the double taxation agreement Malaysia-Singapore of which the respondent was such a company, is required to deduct income tax at the rate of 35% (applicable rate at the material time) from any dividend paid to the

shareholder. However, the company is entitled to frank the income tax to be deducted out of the income tax which it has previously suffered on its taxable profits. For this purpose the company is required to maintain an account known as the "s. 108 account" in order to keep track of the amount of tax franking credit available. Entries to s. 108 account are in the form of credits and debits. The credit total represent tax paid or payable by the company for the current or previous years of assessment. This is called the compared aggregate. The debit total represent the amounts of tax deducted or deemed deducted from dividends paid for the current years of assessment. This is called the compared total.

At the end of the assessment year, the Director General of Inland Revenue (DGIR) will compare the compared total with the compared aggregate. When the compared total exceeds the compared aggregate the amount of the excess is a debt due to the government from the company. In such a situation, the DGIR will issue a written requisition under s. 108(5) of the said Act calling upon the company to pay the amount of the debt. The rationale behind this is that, if not for this charge the government would be paying out (in the form of tax credit to a shareholder of the company) more money than the Government has received from the company on its profits since tax deducted or deemed deducted is imputed to the shareholders as income tax paid in advance.

[8] It is not in dispute that the written requisition under s. 108(5) of the ITA do not constitute taxes but debts. The respondents have through their affidavits, conceded that such sums claim do not constitute taxes but debts. The concession must be due to what has transpired in *Rheem*'s case. In *Rheem*'s case the taxpayer sought to appeal to the Special Commissioners of Income Tax (Special Commissioner) against certain Forms S issued by the DGIR. The DGIR objected to the Special Commissioner's jurisdiction to hear the appeal. The Special Commissioners dismissed the DGIR's objections and held that; (i) s. 108 of the ITA "requisition" was similar to an "assessment"; (ii) s. 108(5) of ITA "debt" was similar to a "tax"; and (iii) the Special Commissioners had jurisdiction to hear a taxpayer's appeal against s. 108(5) requisition to pay a statutory debt.

[9] The DGIR, who was dissatisfied with the decision of the Special Commissioners, applied to the High Court for an order of certiorari to quash the decision of the Special Commissioners. In denying that the Special Commissioners had jurisdiction to hear appeals against s. 108 of the ITA requisition, the DGIR's

A argument before the High Court were: (i) s. 108 of the ITA requisition was not an assessment; and (ii) the debts requisitioned under s. 108(5) of the ITA were not "taxes".

[10] The High Court found in favour of DGIR. Azmel Maamor J B (as he then was) held as follows:

> Thus on the basis of the above explanation, it is very clear that the amount demanded in a requisition is not a tax. Section 108(5) of the said Act states that the amount is a "debt" due and payable. On the service of the requisition. It is not described as C a tax as such. The word "debt" is also used in s. 108 (7) and (8) of the said Act. Under s. 108 (8) the DGIR is authorized to make any necessary revisions in the requisition because of revisions in the compared total and compared aggregate due to any assessment, composite assess, composite assessment or any D repayment of tax.
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> Counsel for the applicant referred to the case of *Comptroller of Income Tax v. BC Co Ltd* [1966] 1 MLJ 287 which held that debt arising under s. 40(4) of the Tax Ordinance (which is equivalent to s. 108(5) of the said Act) and income tax payable under s. 39 E of the said Ordinance were two separate liabilities. Gill J (as he then was) in his decision said:
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> > To use the words of Thomson CJ as he then was, in his dissenting judgment in *A. Omnibus Co. Ltd v. Government of the Federation of Malaysia* which was approved when it came F to the Privy Council in the case which I have cited above, what the Plaintiff is suing for is not income tax as such but a debt which has come into existence by reason of the provision of s. 40 of the Ordinance.
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> In the light of the above, I arrived at the conclusion that a G requisition is not a tax as such but a debt due and payable to the government from the respondent. I therefore held that the Special Commissioners had committed an error of law in concluding that a requisition means a demand for tax.

H **[11]** The decision of the High Court was subsequently confirmed by the Court of Appeal by way of a consent judgement.

[12] *Rheem*'s case clearly established that s. 108 requisition is different from an assessment and treats a debt requisitioned under s. 108(5) (ie, Form S) as something completely different from a tax I assessed under s. 91 (ie, Form J or Form JA). The case also established that s. 108 requisition is not an assessment, and thus it cannot be appealed to the Special Commissioners. Accordingly,

the only avenue to seek judicial resolution of the matter would be to apply for judicial review under O. 53 of the Rules of the High Court 1980, which the applicant did in this case. Hence the submission by the respondents that judicial review is a wrong procedure adopted by the applicant cannot be right. To me, due to DGIR's own conduct in *Rheem*'s case, judicial review is the most appropriate, convenient and suitable procedure for the applicant to challenge the DGIR's decision on s. 108 of the ITA.

[13] Thus, the issue now is whether the Limitation Act 1953 (the Act) is applicable against the second respondent. Section 33(1) of the Act reads as follows:

> 33. Application to the Government.
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> (1) Save as in this Act otherwise provided and without prejudice to section 3 of the Act, this Act shall apply to the proceedings by or against the Government in like manner as it applies to proceedings between subjects and for the purposes of this Act a proceeding by petition of right shall be deemed to be commenced on the date on which the petition is presented:
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> Provided that this Act shall not apply to any proceedings by the Government for recovery of any tax, duty or interest thereon, or to any forfeiture proceedings under any written law in force in Malaysia relating to custom duties or excise or any proceedings in respect of the forfeiture of a ship.

[14] It can be seen from the foregoing, there is a proviso that qualifies the application of the Act to the Government. The Act will not apply to the second respondent in proceedings for recovery of "… tax, duty or interest thereon or to any forfeiture proceedings….". However in light of the DGIR's own argument which was upheld in *Rheem*'s case, it is abundantly clear that the sums claimed under s. 108(1) of the ITA requisition are a form of statutory debt. Such sums clearly do not constitute a tax. Further, it is clear s. 108(5) of the ITA debts do not constitute duty within the meaning of the proviso to s. 33(1) of the ITA as duty in this sense refers to federal taxes, in nature of custom duty, stamp duty, estate duty, etc. For ease of reference s. 108(5) is reproduced which reads as follows:

> (5) Where in relation to a year of assessment and a company the compared total exceeds the compared aggregate:
>
> (a) a sum equal to the amount of the excess shall be a debt due from the company to the Government;

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(b) the Director General shall serve on the company a written requisition in the prescribed form calling upon it to pay the amount of the debt; and

(c) the debt shall be payable by the company to the Director General on the service of the requisition.

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[15] Thus, the crux of the issue is whether the sum requisitioned for years of assessment for 1987 to 1993 is time-barred. Section 6(1)(d) of the Act reads as follows:

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Save as hereinafter provided the following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say:

(d) actions to recover any sum recoverable by virtue of any written law other than a penalty orforfeiture or of a sum by way of penalty or forfeiture.

D

[16] I am of the view that the second respondent's case against the applicant accrued and time started to run upon the applicant's submission of all relevant returns. To me, the submission of the applicant's returns/statements would have fulfilled the requirements of s. 108(5)(a) of the ITA, that is, showing the amount of "debt due" to the second respondent. But the DGIR only issued Form S to recover the debt some eight to eleven years later. Clearly, the DGIR's action was time barred by virtue of s. 6(1) (d) of the Act. The DGIR only acted after the expiration of six years from the date when the debt was due to the second respondent.

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[17] In conclusion, it is my finding that the sums requisitioned by the DGIR for years of assessment of 1987 to 1993 are debts and time-barred under s. 6(1)(d) of the Act, as they are clearly not 'taxes' within the meaning of s. 33 of the same Act.

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[18] For the above reasons, I allowed the applicant's application with costs.

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